

## IN THE MATTER OF ARBITRATION BETWEEN

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State of Minnesota, Department of Transportation (Mn/DOT)	) Saint Paul, MN
	)
“Employer”	) Issue: Reallocation of D. Stefaniak
	)
and	) Hearing Date: May 31, 2006
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	) Record Closed: June 21, 2006
Minnesota Association of Professional Employees (MAPE)	)
	) Award Issued: July 24, 2006
	)
“Union”	) Mario F. Bognanno, Arbitrator

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### **JURISDICTION**

This case was heard on May 31, 2006, in Saint Paul, Minnesota. The parties appeared through their designated representatives who waived the 30-day decisional period referenced in article 9, section 4 of the Collective Bargaining Agreement. (Joint Exhibit 1). Both parties were afforded a full and fair opportunity to present their respective cases. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into the record. The parties submitted post-hearing briefs on or about June 21, 2006. Thereafter, the matter was taken under advisement.

### **APPEARANCES**

#### **For the Employer:**

Anthony Brown	Labor Relations Principal, Minnesota Department of Employee Relations (Mn/DOER)
Valerie Darling	Labor Relations Representative, Mn/DOER
Joy Hargons	Labor Relations Representative, Mn/DOT

Barbara Kochevar	Human Resources Representative, Mn/DOT
Mary Stohr	Labor Relations Representative, Mn/DOT
Richard Peterson	Labor Relations Manager, Mn/DOT
Michael Barns	Chief Information Officer, Mn/DOT

**For the Union:**

Thomas Dougherty	MAPE Business Agent
Richard Kolodziejski	MAPE Business Agent
David Stefaniak	Grievant

**I. FACTS AND BACKGROUND**

The Employer, Mn/DOT, faced an unprecedented budget crisis in early 2003, forcing the layoff of nearly 200 employees statewide many of whom were in the Information Technology Specialist (ITS) series. On May 1, 2003, ITS-3 David Stefaniak, the Grievant, was informed that his position was being abolished and he would be laid off on June 17, 2003, unless he chose to exercise his article 17 bumping rights. That is, unless he chose to replace the least senior employee in his job class (i.e., ITS-3) and class option (i.e., System Software). (Union Tab 1 and Employer Tab 3). Testimony and documented evidence establishes that the Grievant exercised his article 17 bumping rights and, effective June 18, 2003, purportedly replaced ITS-3 Mary O'Reilly, who worked in Mn/DOT's Office of Technical Support (OTS). In turn, Ms. O'Reilly supposedly bumped ITS-3 Ronald Scally, who at the time worked in Mn/DOT's Office of Finance. (Union Tabs 2 and 3 and Employer Tab 6).

As a result of having technically bumped into Ms. O'Reilly's position , the Grievant testified that he believed that he was being directed to perform her former job assignments, as they are implied in her June 22, 2001, position description-Position Control #456810: a document that spells out her individual and job specific technical competencies as well as her skills, knowledge and abilities (SKAs) and, pointedly, a document the Grievant did not have access to until sometime in July 2004, more than a year after he presumably bumped into Ms. O'Reilly's position.<sup>1</sup> (Union Tab 5).

However, in actuality, the OTS management directed the Grievant to perform different assignments and, specifically, tasks that were (are) more aligned with the competencies and SKAs detailed in his position description-Position Control #456810: a document the Grievant signed and read for the first time on November 25, 2003, more than five (5) months after he exercised his bumping rights. (Union Tab 4 and Employer Tab 10). It is important to observe that even though the two position descriptions carry the same position control number, the job specifications in each are quite different, with Ms. O'Reilly's 2001 position description showing that, relative to the Grievant, she spent ("spends", as subsequently discussed) far more of her time with new software

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<sup>1</sup> The layoff and bumping process required that the Grievant physically change job location, moving from the Waters Edge facility to the John Ireland Blvd. building in St. Paul, MN, where the OTS is located. This fact reinforces the undersigned's perception that, as the Grievant testified, he had not previously worked with Ms. O'Reilly and, as a consequence, he did not have direct knowledge of her pre-bump job assignments.

developments like the Artemis Project View, and enhancing and maintaining the software OTS uses and its Internet site.<sup>2</sup>

As the tumult created by the layoff and bumping process began to wane, the Employer determined that a number of worker-job “mismatches” had occurred that needed to be rectified if critical organizational requirements were to be met. Thus, pursuant to article 16 the Employer determined that eleven (11) bumped ITS employees would be “permanently reassigned” to remedy this problem. On June 27, 2003, the Employer shared the names of the specific employees who were to be reassigned with the Union. Among those identified for reassignment were Ms. O’Reilly and Mr. Scally. (Employer Tab 7). Both of these individuals were to be permanently reassigned to their pre-bump positions/classes/offices. Ms. O’Reilly’s reassignment seemingly took effect on July 2, 2003, which is approximately two (2) weeks after she had been bumped.<sup>3</sup> (Employer Tab 8).

Toward the end of 2003, after the churning caused by the layoff, bumping and reassignment processes had stabilized, the Employer decided to embark on a job evaluation study of all its IT positions to determine whether they were being properly “valued”. The most important data used in job evaluation studies are position descriptions. With respect to the Grievant and Ms. O’Reilly, the job evaluation study relied on the position descriptions they had respectively signed

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<sup>2</sup> When Ms. O’Reilly bumped into Mr. Scally’s position she was assigned to a different position, with Position Control #400820. (Employer Tab 9). The position description corresponding with this position control number was not introduced into the record.

<sup>3</sup> Michael Barnes, Mn/DOT’s director of information technology, explained that Ms. O’Reilly was permanently reassigned to OTS because she supported “key” computer systems and, in particular, systems bearing on Mn/DOT’s highway constructions activities, which were in full swing at that time of the summer.

on November 25, 2003 and June 22, 2001, that were previously discussed and identified as Union (Employer) Tab 4 (10) and Union Tab 5.

On July 19, 2004, the Grievant was informed that his position was being “reallocated downward” to ITS-2 class. (Union Tab 6 and Employer Tab 11). Whereas, as he soon learned, Ms. O'Reilly's position was not being reallocated downward – a result that is not surprising to the undersigned given the previously discussed differences between the two (2) position descriptions. But, of course, at that time the Grievant knew neither the text of Ms. O'Reilly's position description nor that he had not and was not being assigned to perform her pre-bump job assignments. All he knew was that the less senior person who he had bumped more than a year earlier was an ITS-3; whereas, he had been reallocated to an ITS-2 class. It was this outcome that caused the Grievant to ask the Employer for a copy of the position description that was used when Ms. O'Reilly's job was evaluated. Then, after having read the text of her position description, the Grievant concluded that he and she were doing different work under the same position control number, and that he had never been assigned to perform her pre-bump (i.e., pre-June 18, 2003) work.

On August 2, 2004, the Grievant appealed the IT Classification Study's adverse determination. On November 7, 2005, the Grievant learned that the appeals panel sustained IT Classification Study's decision. (Union Tab 11 and Employer Tab 12).

In addition, on August 8, 2004, the Grievant also filed a grievance, maintaining that the “[R]eallocation would not have occurred if the grievant had

been provided proper bumping rights as the result of an earlier lay-off (sic).” And, as remedy, the Grievant sought to be “... reinstated to the IT3 position he normally should have bumped into as the result of said lay-off.” (Union Tab 8 and Employer Tab 4). In reply to the grievance, the Employer stated on August 13, 2004, that it was untimely inasmuch as the referenced layoff and bumping process had occurred more than a year earlier. (Union Tab 9 and Employer Tab 4). Unable to resolve the grievance the Union advanced the matter to arbitration. (Union Tab 10 and Employer Tab 4).

## **II. THE ISSUE**

The parties jointly stipulated to the following statement of the issue:

1. Is the grievance timely?
2. Did the Employer violate Article 17 of the Collective Bargaining Agreement, as expressed in MAPE’s grievance?
3. If so, what is an appropriate remedy?

## **III. RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 5            Employer Rights**

It is recognized that except as specifically modified by this Agreement, the Employer retains all inherent managerial rights and any rights and authority necessary to operate and direct the affairs of the Employer and its agencies in all its various aspects.

### **ARTICLE 9            Grievance Procedure**

#### **Section 2. B.**

##### Time Limits:

1. If a grievance is not presented on behalf of the employee within a time limit set forth in this Article, it shall be considered waived.

### **Section 3.**

#### **Procedure. Formal Step 1:**

... No grievance shall be accepted which has been filed more than twenty-one (21) calendar days after the grievant, through the use of reasonable diligence, should have knowledge of the event.

## **ARTICLE 16            Vacancies, Filling of Positions**

### **Section 2.**

#### **Permanent Reassignment**

Whenever the Appointing Authority determines to make a reassignment within thirty-five (35) miles, the Appointing Authority shall, before the reassignment is effected, consider (but not be limited to) the following:

- A. The employee's ability to do the job;
- B. The employee's qualifications to perform the job;
- C. The employee's interest in the job;
- D. The employee's current work load;
- E. The employee's Classification/Class Option Seniority.

## **ARTICLE 17            Layoff and Recall**

### **Section 4.**

#### **Layoff Options.**

- a. The employee(s) receiving notice of layoff shall be placed in a vacancy

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If there is no such vacancy, the employee shall either:

- (1) Bump the least senior employee in the seniority unit, same class (same option or another option within the class for which the employee is determined by the Employer to be qualified) and same employment condition within thirty-five (35) miles of the employee's current work location; or
- (2) Accept a vacancy in the same seniority unit in an equal class in which the employee previously served or for which the employee is determined by the Employer to be qualified and in the same employment within thirty-five (35) miles of the employee's current work location.

Employees who have elected not to bump under “1” above and who have not been offered “2” shall be laid off.

(Joint Exhibit 1).

#### **IV. POSITION OF THE UNION**

Initially, the Union raises the timeliness issue, arguing that the Grievant did not realize that his article 17 bumping rights, exercised effective June 18, 2003, had not been satisfied until after he was “reallocated downward”, on July 19, 2004. Shortly after that date and after reading Ms. O’Reilly’s June 22, 2001, position description, he realized that when the job evaluation study was rolled out in late 2003, Ms. O’Reilly was still performing her pre-bumping work, which was work that he thought he had taken over following his June 18, 2003, bump into her position. Thus, the Union contends, the grievance dated August 2, 2004, is timely as it was filed well within “...twenty-one (21) calendar days ... after the grievant ... [had] knowledge of the event”, namely: that he had been denied his article 17 bumping rights nearly a year earlier.

Next, the Union urges that if the Grievant had truly assumed Ms. O’Reilly’s job assignments, as he should have, then her June 22, 2001, job description would have applied to his case and he would not have been “allocated downward” to the ITS-2 class (for the same reasons that she was not). In this vein, the Union alleges that the Employer attempted to create the “illusion” of legitimate bumps/reassignments through the creation of a contrived paper trail. Namely, a paper trail showing that the Grievant bumped into Ms. O’Reilly’s OTS position, that Ms. O’Reilly bumping into Mr. Scully’s Office of Finance position,



and, finally, that Ms. O'Reilly was permanently reassigned to her former OTS position when, in reality, the Grievant had never bumped into her OTS position because she had never vacated it.

Further, the Union points to the “[B]ump the least senior employee...” language in article 17, arguing that it is clear, unambiguous and contemplates that a bumping employee will “physically occupy” the bumped employee’s position. In addition and for the following reasons, the Union observes that it and the Grievant had every reason to believe that this right was realized: (1) Ms. Kochever, a long-term Mn/DOT Human Resources Representative, testified that she told the Grievant that he would be bumping Ms. O'Reilly; (2) the Employer had never objected to the Grievant’s decision to bump Ms. O'Reilly; and (3) the Employer had never suggested that the Grievant lacked the qualifications or experience required to perform Ms. O'Reilly’s OTS job assignments.

Finally, while the Union does not contest the Employer’s right to “permanently reassign” employees under article 16, it does argue that the job security foundation upon which article 17 rests is meaningless unless bumps are fully executed to the benefit of senior, laid-off workers. As remedy, the Union seeks wages and benefits wrongfully denied the Grievant and restoration of his ITS-3 class.

## **V. POSITION OF THE EMPLOYER**

The Employer initially argues that it correctly interpreted and applied article 17 when it laid-off the Grievant and then allowed him to bump into the least senior ITS-3 position held by Ms. O'Reilly. Indeed, the Employer continued,

it kept the Union fully cognizant of all layoff, bumping and permanent reassignments involving the Grievant, Ms. O'Reilly and all other affected IT employees in the bargaining unit and that neither the Union nor the Grievant grieved its actions at that time.

Moreover, the Employer contends that the Grievant bumped into Ms. O'Reilly's position in OTS, at which time both held positions designated by the position control number 456810; whereas, significantly, upon Ms. O'Reilly's reassignment to the OTS, her position control number was and is 400820. In addition, the Employer points out that the Collective Bargaining Agreement does not guarantee that that employees who bump under article 17 will always be assigned the precise set of position responsibilities that were being performed by the employees who are being bumped. And, in regard to the instant matter, the Employer urges that the Grievant was minimally qualified to perform job assignments of the ITS-3 class, System Software option – job assignments that he was given, although at variance from the precise duties Ms. O'Reilly had been performing and to which she was properly reassigned to perform under article 16, based on legitimate organizational needs. For all of these reasons, the Employer argues that the grievance should be denied on substantive grounds.

Further, on technical grounds, the Employer contends that the article 17 grievance is not timely, since it was filed on August 8, 2004, and not within twenty-one (21) calendar days of the Grievant's layoff and bump, which occurred in June 2003; and, still further, the grievance is not timely because it does not allege that the Employer may not execute permanent reassignments under

article 16, which occurred in July 2003, when Ms. O'Reilly was reassigned to work in the OTS. Finally, the Employer suggests that although the Grievant's position was "reallocated downward" this happened more than one (1) year following the Employer's article 17 actions, and that this was a contract compliant determination. For these reasons, the Employer urges that the grievance should also be denied on technical, procedural grounds.

## **VI. OPINION**

### **I. The Substantive Merits.**

The fighting issue in this case is that the Employer violated the Grievant's article 17 layoff and bumping rights when it failed to properly assign him to perform Ms. O'Reilly's job assignments in June 2003: a fact that arguably resulted in his ultimate "downward reallocation" in July 2004. In reply, the Employer demurs, asserting that Ms. O'Reilly was permanently reassigned to a position in the OTS in July 2003, per article 16 because " ... the 2003 highway construction season was in full swing and Ms. O'Reilly's expertise and (sic) was needed to be available virtually uninterrupted." (Employer's Brief @ page 10).

An analysis of these competing positions results in a number of findings and conclusions. First, the record evidence documents that following the Grievant's layoff, he bumped into Ms. O'Reilly's position in the OTS;<sup>4</sup> that Ms. O'Reilly bumped into Mr. Scully's in the Office of Finance;<sup>5</sup> and that

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<sup>4</sup> With reference to Employer Tab 6, Ms. Kochevar testified that she would have told the Grievant that if he chose to bump, then he would bump into Mary's "situation". See also Union Tab 4.

<sup>5</sup> See Union Tab 4.

organizational needs dictated that Ms. O'Reilly be permanently reallocated to assume her former OTS job assignments.<sup>6</sup>

Second, the foregoing notwithstanding, the record trail described above does not conform to on the ground reality. That is, as the Union alleges, the Grievant did not actually bump into Ms. O'Reilly's position, in spite of Employer commentary and documents to the contrary.<sup>7</sup> Therefore, by implication, the evidence suggests that Ms. O'Reilly did not actually bump into Mr. Scully's position in the Office of Finance, and that she continued to perform her OTS job assignments, calling into question the Employer's motivation in "permanently reassigning" her to a position she had never vacated.

Third, from the above, the undersigned is persuaded that the Grievant did not "Bump the least senior employee in the seniority unit...", as he understandably expected to do and as was his article 17-right to do. The Employer's argument that the Grievant did bump into Ms. O'Reilly's class and option is not compelling because article 17 assures the right to bump "the least senior employee", which can only be interpreted to mean the right to bump into the least senior employee's position. In addition, while the Employer's argument

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<sup>6</sup> Mr. Barns testified that Ms. O'Reilly supported the OTS' construction systems. Further, he testified that the Grievant would have difficulty staffing such systems, causing performance problems to arise. In this respect, Barns testified that "From day 1 the construction system would have been a new language" for the Grievant. Thus, he reassigned Ms. O'Reilly to OTS. See also Employer Tabs 7, 8 and 9.

<sup>7</sup> In actuality, the Union alleges, the Grievant did not assume the responsibilities of Ms. O'Reilly's position, even though he bumped into it. A thorough review of the testimonies by Employer-witnesses Ms. Kochevar, Mr. Peterson, Mn/DOT's Labor Relations Manager, and Mr. Barns discloses that none ever refuted this contention. Further, the undersigned was impressed by Ms. Kochevar's testimony while under cross-examination. Specifically, Ms. Kochevar testified that a bump occurs when "somebody with more seniority in a class replaces someone with less seniority, and that when the bump is in the same class option, qualifications are not an issue". Consequently, she continued: "I'd expect David to be able to handle Mary's old job". When asked why the Grievant was not permanently reassigned after management concluded that he would not successfully perform at O'Reilly's job, Ms. Kochevar answered: "I don't know."

that “Bumping does not guarantee the ‘bumper’ the exact duties of the employee who is bumped” is true,<sup>8</sup> it borders on irrelevancy for the simple reason that the Grievant did not effectively bump into Ms. O’Reilly’s position, regardless of the specifics of its job content at the time. Critically, however, the undersigned is not suggesting that the Employer did not have an article 16 right to subsequently permanently reassign Ms. O’Reilly to her former position. That right clearly existed, but it presumed that an antecedent step had first been taken, namely: that Ms. O’Reilly had been “physically” bumped from her position, as the Union persuasively argues in so many words. The job security rights nested in article 17 are too important to allow article 16’s reassignment rights to be executed prior to a realization of the former’s full implementation. With respect to the facts of this case, it seems clear that articles 16 and 17 are structurally connected in the sense that if bumping under article 17 creates worker-job mismatches; permanent reassignments under article 16 may then be made. That is to say that the case for a reassignment is sometimes necessitated when a bumping employee is not suited for the position into which he has effectively bumped.

Lastly, while the undersigned concludes that Grievant’s article 17 bumping rights were not satisfied, as alleged in his August 8, 2004, grievance, he does not find that violation *per se* resulted in the Grievant’s July 2004, “downward reallocation”, as stated in the grievance statement. To the contrary, even if the Grievant had properly bumped into Ms. O’Reilly’s position, she, nevertheless, would have been permanently reassigned to her pre-bumped position, as credibly implied in Mr. Barns’ testimony.

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<sup>8</sup> See Employer’s Brief @ page 8.

## **II. The Merits of the Timeliness Challenge.**

Just because the Union's substantive claim has merit, does not always insure an arbitral remedy. In this case, relying on article 9 in the Collective Bargaining Agreement, the Employer contends that the grievance was not presented within the time limits set forth in the agreement. However, following a careful review of the record, the undersigned must dismiss the Employer's contention for the simple reason that the contract's twenty-one (21) calendar day provision was not abridged.

Article 9's relevant timing provision requires that a grievance must be filed within "... twenty-one (21) calendar days after the grievant, through the use of reasonable diligence, should have knowledge of the event." (Joint Exhibit 1, emphasis added). In this case, the Grievant could not and did not know that he had not actually bumped into Ms. O'Reilly's position until after his July 19, 2004, downward reallocation. He had been reclassified downward and she had not been: "How could that be?" one might think he rhetorically mused. Thus, he proceeded to acquire a copy of Ms. O'Reilly's position description; the one used by the job evaluation team. A comparison between his and her position descriptions may have explained to him why he was downwardly reallocated and she was not; but, more importantly, this comparison did cause the Grievant to conclude that subsequent to his 2003 layoff, he did not actually bump into Ms. O'Reilly's position. Contractually, sometime after July 19, 2004, the Grievant concluded "... through the use of reasonable diligence..." that he did not bump into her position on June 18, 2003, as he had been led to believe was the case.

On August 8, 2004, well within twenty-one (21) calendar days of "... knowledge of the [alleged] event", the Grievant filed his grievance. Said filing was contractually timely; and the Employer's arguments to the contrary are simply not persuasive.

### **III. The Remedy.**

The most difficult aspect of this case is framing an adequate and equitable remedy. The Employer argues that to grant the Union's remedy of placing the Grievant in Ms. O'Reilly's ITS-3 position, would first lead to the implementation of the aforementioned bumping sequence involving Ms. O'Reilly and Mr. Scally (i.e., she would bump into his Office of Finance position and so on); and, then to correct the resulting worker-job mismatches, the Employer would exercise of its article 16 right to permanently reassign the latter two (2) employees to their former OTS and Office of Finance positions, respectively. This sequence would return the Grievant to the position he presently holds.

There is no reason to believe that the Employer would not act in this precise manner. Indeed, it is too bad that it did not follow this sequence back in June 2003, when it wrongly denied the Grievant's right to effectively bump into Ms. O'Reilly's position. The upshot, nevertheless, is that ultimately the Grievant would be performing the work he is currently performing and that has been credibly evaluated as being ITS-2 work. Accordingly, for work performed between July 19, 2004, and the date of this Award (inclusively), the Grievant shall be awarded all wages and benefits that would have accrued to him had he not been reassigned down from an ITS-3 to a ITS-2 class. However, to avoid wage and

benefit “windfalls”, this remedy shall not and does not alter the Grievant’s current position/class/option. The retroactive monetary award ordered herein is deemed by the undersigned to be equitable consideration for the Employer’s violation of the Grievant’s article 17 bumping rights back on June 18, 2003.

**VII. AWARD**

For the reasons discussed above, the grievance is sustained. On June 18, 2003, the Employer violated the Grievant’s article 17 rights, as alleged. For the limited purposes of overseeing the implementation of the retroactive monetary (i.e., wage and benefits) remedy discussed above, the undersigned retains jurisdiction over this case.

Issued and ordered on July 24, 2006, in Tucson, Arizona.

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Mario F. Bognanno, Labor Arbitrator